No. 86-1762

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that petitioner's alleged "good faith doubt" that the union continued to enjoy majority support was tainted by the coercive acts of one of petitioner's supervisors.

2. Whether employer statements that tend to coerce employees in the free exercise of their rights with respect to union representation are protected by either Section 8(c) of the National Labor Relations Act, 29 U.S.C. 158(c), or the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A131-A133) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A109-A130), including the opinion of the administrative law judge (Pet. App. A1-A108), are reported at 280 N.L.R.B. No. 11.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1987. A timely petition for rehearing was denied on March 31, 1987 (Pet. App. A134-A135). The petition for a writ of certiorari was filed on May 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO (the Union), has been the exclusive bargaining representative of the registered nurses of petitioner, Manhattan Eye, Ear and Throat Hospital, since 1980 (Pet. App. A4-A5). The Union's most recent collective bargaining agreement with petitioner expired on June 13, 1984 (*id.* at A112). After attempting unsuccessfully to negotiate a new collective bargaining agreement with petitioner, the Union commenced an economic strike on July 13, 1984 (*ibid.*). While this strike was ongoing, one of petitioner's registered nurses, Farideh Ajdari, filed a petition with the National Labor Relations Board (NLRB) to decertify the Union (*id.* at A112-A113). The NLRB scheduled a decertification election for August 30, 1984, but postponed that election, pursuant to its standard procedures, when the Union filed unfair labor practice charges alleging, inter alia, that one of petitioner's supervisors, named Euphemia James, had solicited employees to resign from their union membership in furtherance of a campaign to decertify the Union (in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1)) (Pet. App. A112-A113).

Prior to the NLRB's consideration of these unfair labor practice charges, Nurse Ajdari gathered, and on September 6, 1984, presented to petitioner, cards from 51 of petitioner's 101 registered nurses stating that they no longer wished to be represented by the Union (Pet. App. A113). On September 7, 1984, petitioner notified the Union that it had a good faith doubt concerning the Union's continuing majority support and, accordingly, was withdrawing its recognition of the Union as the exclusive bargaining representative of its nurses (*ibid.*). As support for its good faith doubt, petitioner cited the fact that a majority of the nurses had returned to work, that it believed that many, if not all, of

these nurses had also resigned from the Union, and that it had received a petition signed by a majority of the nurses asking it to withdraw recognition (*ibid.*). The Union responded by filing additional unfair labor practices charges with the NLRB, alleging, inter alia, that petitioner had unlawfully withdrawn its recognition of the Union (and thus had violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5)) (Pet. App. A2, A9-A10).

2. The NLRB's General Counsel filed complaints based on the various Union charges and alleging, inter alia, that petitioner's withdrawal of recognition violated Section 8(a)(1) and (5) because the evidence of loss of support by the Union was tainted by the coercive actions of Supervisor James. At the hearing with respect to the General Counsel's complaints, four of petitioner's registered nurses—Soledad Soriano, Alicia Young, Rosia Merka, and Patricia Simmons—testified that, while they were on strike, Supervisor James had contacted them and suggested that they could return to work only if they resigned from the Union (Pet. App. A114-A116).[1] Supervisor James testified that, during July 1984, she had spoken to most of petitioner's nurses in connection with her campaign for office in the

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[1]Specifically, Nurse Soriano testified that, on or about July 23, 1984, Supervisor James telephoned her at her residence (Pet. App. A37). Soriano indicated that James said that she was calling on behalf of petitioner's Director of Nursing and Director of Education to ask Philipino nurses to return to work, that Soriano could resign from the Union, and that she could not come back to work without having done so (*id.* at A114-A115).

Nurse Young testified that, on July 26, 1984, Supervisor James told her that " 'a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union,' " that she should " 'write to * * * [a particular union official] if * * * [she] wanted to resign,' " and to " 'send it by certified mail' "(Pet. App. A115). Young further stated that Supervisor James phoned her again a week later and told her that " 'almost all the nurses are resigning already * * *,' " " 'that they were coming back to

Philippine Nurses Association (*id.* at A47) but that the subject of resignation had come up in those conversations only with nurses who had first indicated that they wanted to return to work but were afraid that the Union would fine them for crossing the picket line (*id.* at A35-A36, A42, A47-A49). None of the nurses corroborated Supervisor James's testimony; indeed, Nurses Merka and Simmons stated that Supervisor James had not mentioned the possibility that they could be fined for crossing the picket line if they did not resign (*id.* at A116-A117).

On the basis of this testimony, the administrative law judge (ALJ) ruled that petitioner had not committed the charged unfair labor practices (Pet. App. A1-A108). He found that many of Supervisor James's responses were evasive and that her testimony could not be credited to the

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work,' " and that, " 'you can come back any time * * * but you have to resign first from the union * * *' " (*ibid.*). Young replied that she was not " 'coming back to work until the strike is over' " (*id.* at A116).

Nurse Merka testified that Supervisor James telephoned her, on July 27, 1984, indicating that she had been asked by petitioner's Director of Education to " 'call the Filipino nurses to return to work' " (Pet. App. A116). Nurse Merka further stated that, a week later, Supervisor James called her again and, in the course of that conversation, remarked that Merka was " 'still not back to work,' " that she should write to her union official, and that, " 'if I need some help to write, she could help me to write the letter that I will no longer be a member of [the union]' " (*ibid.*).

Nurse Simmons testified that, late in August, when the strike was almost over, she had telephoned the hospital nursing office to find out the procedure for returning to work and that Supervisor James had answered the phone (Pet. App. A46, A117). She further stated that Supervisor James had told her to send a resignation letter by certified mail to the Union and, furthermore, that Supervisor James had dictated the format of the letter and had told her that this was the procedure she had to follow to return to work (*id.* at A117). Simmons in fact submitted a letter of resignation to the Union (C.A. App. 217).

In addition, another staff nurse, Parvan Valentini, testified that Supervisor James told her that, " 'if you wish to come back to work, you have to resign from the Union' " (Pet. App. A123-A124 n.7).

extent that it conflicted with the testimony of the nurses (*id.* at A55). But he nevertheless found that the nurses' testimony did not establish that Supervisor James's actions were "coercive" within the meaning of Section 8(a)(1) and therefore that petitioner's withdrawal of recognition from the Union was not "tainted" by those actions (*id.* at A59-A69, A81-A89).

The NLRB, however, found merit in the exceptions taken with respect to the ALJ's findings (Pet. App. A109-A130). It observed that an employer does not violate the NLRA merely by providing information to employees concerning how to resign from a union " 'as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right[,] nor offers any assistance, [n]or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation' " (*id.* at A121). Here, it found that Supervisor "James [had] solicited resignations from the Union and conditioned return to work on resignation from the Union," that "James [had] explicitly stated that she was calling on behalf of her superiors," and that "James [had] thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership" (*id.* at A122). In such circumstances, the NLRB concluded, petitioner had done more than provide information or proffer "ministerial" assistance to the nurses; rather, petitioner had engaged in conduct that "tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference * * * regardless of whether there is evidence that * * * [Supervisor James] actually achieved a coercive effect" (Pet. App. A122, A123 (citations omitted)). And, "[h]aving found this violation," it concluded "that [petitioner's] asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union" (*id.* at A123, A124). Accordingly, it entered a remedial order requiring, among

other things, that petitioner bargain with the Union upon request (*id.* at A125-A127).

3. In a per curiam opinion, the court of appeals upheld the NLRB's decision and enforced its order (Pet. App. A131-A133). The court found "that there is substantial evidence on the record to support [the NLRB's] determination" (*id.* at A132).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. After a collective bargaining agreement expires, a duly recognized union enjoys a presumption of majority support and an employer must continue to recognize and bargain with that union. See *Bellwood General Hospital, Inc.* v. *NLRB*, 627 F.2d 98, 102-103 (7th Cir. 1980); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982). The employer may withdraw its recognition and refuse to bargain only if it has "clear, cogent, and convincing" evidence that the union in fact no longer enjoys majority support or an objectively based reasonable doubt concerning the union's continuing majority status. See *NLRB* v. *Pennco, Inc.*, 684 F.2d at 342; *NLRB* v. *Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978). Importantly, no such reasonable doubt may be found where the employer is judged to have engaged in activities that, in the totality of the circumstances, have a "reasonable tendency" to intimidate employees in the exercise of their choice whether to continue to support the union. *Amason, Inc.*, 269 N.L.R.B. 750, 750 n.2 (1984), enforced mem., 758 F.2d 648 (4th Cir. 1985); accord, *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1971); *A.A. Superior Ambulance Service*, 263 N.L.R.B. 499, 511 (1982). The NLRB found, and the court

of appeals agreed, that Supervisor James's activities had precisely such a coercive tendency. See Pet. App. A122-A123, A132. Thus, the decision below is in accord with settled law.

2. Petitioner errs in suggesting (Pet. 18-29) that the NLRB failed to find a causal link between the unfair labor practices and the disaffection of a majority of the bargaining unit. The determination that there was such a causal link does not require a finding that specific employees were coerced by the unfair labor practices, but can be based, as it was here, on the NLRB's finding that the unfair labor practices created an atmosphere in which employees would reasonably tend to feel intimidated or coerced. See *Amason, Inc.*, 269 N.L.R.B. at 750 n.2; *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d at 16: *A.A. Superior Ambulance Service*, 263 N.L.R.B. at 511; see also *Clear Pine Mouldings, Inc.* v. *NLRB*, 632 F.2d 721, 730 (9th Cir. 1980) (bargaining order is appropriate when it is "reasonable to infer that * * * [employer] might have caused the decline in union membership through its own unfair labor practices"), cert. denied, 451 U.S. 984 (1981); *NLRB* v. *A.W. Thompson, Inc.*, 449 F.2d 1333, 1337 (5th Cir. 1971) ("bargaining order is appropriate even in the absence of proof that the Union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the Company"), cert. denied, 405 U.S. 1065 (1972).[2] Here, the

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[2]The cases that petitioner cites (Pet. 21-26) are not to the contrary. In *Daisy's Originals, Inc.* v. *NLRB*, 458 F.2d 493, 500 (5th Cir. 1972), the court relied on the NLRB's finding that the employer's prior unfair labor practices would not adversely affect an election. In *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d at 16 (citation omitted), the court found that, based on the evidence in the record, the technical violations that the employer had previously committed had no " 'reasonable tendency in the totality of the circumstances to intimidate.' " In *Hotel, Motel & Restaurant Employees & Bartenders Union* v. *NLRB*, 785 F.2d 796, 799 (9th Cir. 1986), the court upheld the NLRB's *refusal* to issue a bargaining order where no "taint" from the

NLRB found that Supervisor James's actions created a situation in which employees "would tend to feel imperiled in maintaining their [union] membership" (Pet. App. A122) and therefore that petitioner's "asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union" (*id.* at A124). This finding—that petitioner's unfair labor practices would reasonably tend to intimidate employees in the exercise of their choice whether to continue to support the Union—is the "causal link" that petitioner claims is missing in this case.

Indeed, as we read the petition, the real complaint here is not that the NLRB failed to find a "causal link" between the unfair labor practices and the majority's disaffection from the Union, but rather that the NLRB made such a factual finding in the circumstances of this case. See Pet. 1, 28 (arguing that a "de minimis" or "minor" unfair labor practice cannot reasonably tend to intimidate employees in the exercise of their choice whether to continue to support a union). This Court, however, has said that the NLRB's factual findings, when affirmed by a court of appeals (as here) (Pet. App. A132), do not merit review on certiorari. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the NLRB's determination that such a

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employer's prior unfair labor practices existed. In *Pittsburgh & New England Trucking Co.* v. *NLRB*, 643 F.2d 175, 178 (4th Cir. 1981), the court denied enforcement of a bargaining order because the NLRB had refused to consider evidence proffered by the employer in support of its asserted good faith doubt. In *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 194-195 (8th Cir. 1974), and *NLRB* v. *Anvil Products, Inc.*, 496 F.2d 94, 96-97 (5th Cir. 1974), the courts found no evidence to support the NLRB's findings with respect to the unfair labor practices that underlay the bargaining orders. And, finally, in *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 47-50 (D.C. Cir. 1980), the court simply refused to enforce a bargaining order that had been issued, without explanation, seven years after the employer's refusal to bargain, and after the union had lost an intervening election.

causal link existed here is clearly supported by substantial evidence: Supervisor James individually contacted most of petitioner's nurses (Pet. App. A47); she then solicited the nurses' resignations from the Union (*id.* at A114-A116); she represented that she was calling on behalf of management (*id.* at A122); the nurses discussed James's telephone calls among themselves (*id.* at A68-A70); and petitioner's alleged doubt concerning the Union's majority support was based on cards from a bare majority of the employees (*id.* at A113). In these circumstances, it was eminently reasonable for the NLRB to conclude that Supervisor James's statements had a "reasonable tendency" to intimidate employees in the exercise of their choice whether to continue to support the Union and that knowledge of Supervisor James's unlawful statements was not confined to the five nurses who testified at the hearing. See *Irving Air Chute Co.* v. *NLRB*, 350 F.2d 176, 179 (2d Cir. 1965) (footnote omitted) ("Evidence of the dissemination of the Company's threats or that they were part of an organized program of coercion is also not required. * * * '[A]ny expressions of company attitudes even to small groups of individuals, were likely to be rapidly disseminated around a plant during the struggle of organization.' "); cf. *NLRB* v. *Mr. Porto, Inc.*, 590 F.2d 637, 639 (6th Cir. 1978) ("a close election is a factor which demands that even minor infractions be scrutinized carefully").

3. Petitioner contends (Pet. 29-37) that this case presents a "novel" question concerning whether either Section 8(c) of the NLRA, 29 U.S.C. 158(c), or the First Amendment protects "non-threatening" speech unaccompanied by coercive conduct. But petitioner's premise is wrong. The NLRB, affirmed by the court of appeals (Pet. App. A132), found that Supervisor James' phone calls to employees created a situation in which employees would tend to feel "imperiled" in the exercise of their Section 7, 29 U.S.C. 157, rights (*id.* at A121-A122). Thus, the speech and conduct involved in this

case were not, as petitioner alleges, "non-coercive" and, accordingly, were not entitled to the protection of Section 8(c) or the First Amendment. See *Electrical Workers* v. *NLRB*, 341 U.S. 694, 704 (1951) ("[t]he remedial function of [Section] 8(c) is to protect non coercive speech * * * in furtherance of a lawful object"); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477-479 (1941) (same with respect to First Amendment). See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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